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No.

Supreme Court, U.S.
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In the Supreme Court of the United States.

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

PAUL TANSO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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ISSUE PRESENTED

Whether the Sixth Amendment prevents the prosecution from introducing at trial an unavailable witness's prior testimony in the absence of defendant's explicit waiver of cross-examination or an explicit judicial order to cross-examine or forego the opportunity?

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COMMONWEALTH OF MASSACHUSETTS,
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v.

PAUL TANSO,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

The petitioner Commonwealth of Massachusetts respectfully requests this Court grant the petition for writ of certiorari.

OPINION BELOW

The opinion of the court below is reported at 411 Mass. 640, 583 N.E.2d 1247 (1992). (Appendix A).

JURISDICTION

The decision of the court below was entered on January 14, 1992. Respondent petitioned for rehearing, which was denied on February 6, 1992. (Appendix B). The jurisdiction of this court is invoked under 28 U.S.C. §1257(3). The Commonwealth's Motion to Stay Issuance of Rescript was allowed on February 3, 1992. (Appendix C). This petition is filed within ninety days of the denial of rehearing. Sup. Ct. Rule 13.4.

CONSTITUTIONAL PROVISION INVOLVED

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

On February 23, 1986, defendant Paul Tanso was arrested for the murders of John Bottari and Frank Angelo Chiuchiolo. He was arraigned the next day in the Boston Municipal Court, and his case, along with that of one of two codefendants, was continued to March 3, 1986, for a joint probable cause hearing. On Monday, March 3, 1986, defendant waived his right to a probable cause hearing, and the judge allowed the Commonwealth's Motion, filed under Mass. R. Crim. P. 35, 378 Mass. 906 (1979), to depose two eyewitnesses to the murder, Joseph Schindler and Richard Storella. Commonwealth v. Tanso, 411 Mass. 640, 642, 583 N.E.2d 1247, 1249 (1992). The witness Schindler was sworn and gave testimony. At the close of direct testimony, defense counsel stated he was not prepared for cross-examination. The

judge continued the case until the next day and announced he would order defense counsel "either to take cross-examination at that time or waive it."

The next day, March 4, 1986, the witness Storella gave direct testimony before the Municipal Court judge. Defense counsel made objections throughout the direct, but said that he was still unprepared for cross-examination. He moved to hold Storella in protective custody until he had an opportunity to cross-examine and asked for full discovery. Id. at 643, 583 N.E.2d at 1249-1250.

The judge continued the case for three days and the Commonwealth provided by 5:00 p.m. that day all discovery it had in its possession which had not been previously provided.

On Friday, March 7, 1986, the witness Storella was presented for cross-

examination. The judge specifically informed the defendant that by not cross-examining Storella he "may lose the right to and the opportunity ever to cross-examine this witness and that this witness's testimony presented in this court may ultimately be used in a trial of this matter." (Tr. 3/7/86 at 167). Defendant's counsel, with the knowledge and consent of defendant, declined the opportunity to cross-examine Storella, stating he was not prepared to effectively cross-examine.[1/] The judge concluded the proceedings, and bound the case over to the grand jury. 411 Mass. at 643-644, 583 N.E.2d at 1250.

Indictments were returned in May, 1986 and in October, 1986, defendant

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1/ The judge conducted the same procedure when offering cross-examination of Schindler. Defendant's response was the same for both witnesses. (Tr. 3/7/86 at 160-161).

moved to complete the witness depositions. A judge of the Superior Court ordered that cross- and redirect examination of the two witnesses be held. Schindler's deposition was completed, but Storella had disappeared and it was impossible for the Commonwealth to produce him.

Just prior to trial defendant moved to exclude Storella's prior testimony and the Commonwealth moved that Storella be declared unavailable and for permission to admit his deposition testimony in evidence. A judge of the Superior Court, after hearing, ruled that defendant had been offered an adequate opportunity to cross-examine Storella at the Municipal Court proceeding, but with the consent of the defendant, chose not to cross-examine for strategic reasons. Id. at 644-645, 583 N.E.2d at 1250. He concluded that the opportunity to cross-examine, absent

actual cross-examination, satisfied the indicia of reliability requirement of the Confrontation Clause, and ruled the prior testimony admissible if, prior to the introduction of the testimony, the Commonwealth could demonstrate the witness was unavailable. He gave defendant an opportunity to raise objections to certain portions of the testimony prior to trial. (Appendix D).

The case came to trial before another judge who admitted Storella's prior testimony after finding the Commonwealth had proved the witness unavailable. Defendant was convicted of two indictments of first-degree murder and of carrying a firearm. 411 Mass. at 641, 645, 583 N.E.2d at 1249, 1250.

On appeal, the Supreme Judicial Court reversed, holding that because respondent did not explicitly waive his right to cross-examine the witness, admissions of

the prior testimony violated his right to confrontation under the Sixth Amendment. Id. at 641, 583 N.E.2d at 1249.

The Supreme Judicial Court held that 1) the Municipal Judge's failure to set a deadline by which respondent would have to cross-examine or waive his right to do so; 2) his failure to hold a hearing to determine what time was needed for a reasonable opportunity to cross-examine; and 3) his failure to rule that respondent had been given a reasonable opportunity to cross-examine, precluded a finding of waiver. Id. at 649, 583 N.E.2d at 1253.[2/]

2/ The court reversed defendant's convictions on January 14, 1992. Defendant's petition for rehearing was denied on February 6, 1992. (Appendix B).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW ERECTED CONSTITUTIONAL REQUIREMENTS TO THE ADMISSION OF AN UNAVAILABLE WITNESS'S PRIOR TESTIMONY THAT ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS.

The court below ruled that a defendant who declines to cross-examine a witness at a preliminary hearing is denied his Sixth Amendment confrontation rights when that witness's testimony is admitted at trial,[3/] unless he explicitly waived cross- examination or was given a judicial order to cross-examine by a certain time or be deemed to have waived his opportunity to do so. Commonwealth v. Tanso, 411 Mass.

3/ This case raises no issue concerning the availability of the witness at trial. Although the Supreme Judicial Court found the evidence conflicting, it did not disturb the trial judge's finding that the Commonwealth proved the witness unavailable. 411 Mass. at 646 n.7, 650 & n.9, 583 N.E.2d at 1251 n.7, 1253-1254 & n.9.

at 646 n.7, 650, 583 N.E.2d at 1251 n.7, 1254. Despite the fact that defendant had been given full discovery, and had three days since the direct to prepare cross-examination and announced a tactical reason for refusing to examine the witness, the Supreme Judicial Court held that defendant had not been given a reasonable opportunity to cross-examine the witness.

The court held that the defendant could not have waived his chance to cross-examine because the judge conducting the hearing 1) failed to set a specific deadline in which the defendant had to cross-examine the witness; 2) did not specifically inform the defendant that failure to cross-examine by that time would constitute waiver; and 3) failed to hold a hearing to inquire into how much time would be needed for a reasonable opportunity to effectively

cross-examine. Id. at 649, 583 N.E.2d at 1253.

In imposing these impediments to a finding of waiver, the court made them absolute Sixth Amendment prerequisites to the admissibility of prior testimony, expanding a defendant's rights under the Confrontation Clause far beyond what this Court has established, in conflict with the decisions of other courts which have ruled on the issue. The practical effect of the decision below is to permit a defendant to decline to cross-examine a witness at a preliminary hearing for tactical or other reasons, and effectively prevent the admission of that evidence at trial should the witness become unavailable.

In a series of cases, since at least from Mattox v. United States, 156 U.S. 337 (1895), this Court has consistently upheld, against confrontation challenges,

the admission of prior testimony of a witness who is unavailable at trial. Ohio v. Roberts, 448 U.S. 56 (1980), sets forth the "general rule" for determining whether hearsay meets the requirements of the Confrontation Clause to warrant its admissibility at a subsequent trial. Once a witness is shown to be unavailable, his prior statement is admissible only if it bears adequate "indicia of reliability." Where the evidence is not a firmly rooted exception to the hearsay rule,[4/] the

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4/ While former testimony of an unavailable witness has become a firmly rooted hearsay exception that might qualify for admission without proof of reliability or unavailability under the authority of Bourjaily v. United States, 483 U.S. 171, 182 (1987), and United States v. Inadi, 475 U.S. 387, 400 (1986) (coconspirator exception), see United States v. Zannino, 895 F.2d 1, 5 (1st Cir. 1990); United States v. Salim, 855 F.2d 944, 954-955 (2d Cir. 1988); Fed. R. Evid. 804(b)(1), this Court has recently determined that prior testimony is

(footnote continued)

government must establish the evidence has "particularized guarantees of trustworthiness." Id. at 66. See Mancusi v. Stubbs, 408 U.S. 204, 213 (1972); Dutton v. Evans, 400 U.S. 74, 89 (1970).

In Roberts, this Court found the state met its burden that the testimony at the preliminary hearing possessed sufficient indicia of reliability "particularly because defense counsel had had an adequate opportunity to cross-examine the declarant at the preliminary hearing." Idaho v. Wright, ___ U.S. ___, 110 S. Ct. 3139, 3146 (1990).

(footnote continued)

different in nature from other deeply rooted hearsay exceptions. White v. Illinois, ___ U.S. ___, 112 S. Ct. 736, 743 (1992).

Roberts left open, however, the question whether the absence of cross-examination at a preliminary hearing would defeat the later admissibility of prior hearing testimony. 448 U.S. at 70. This case squarely raises that issue because each of the other factors considered in Roberts and California v. Green, 399 U.S. 149 (1970), are present: the witness was under oath, defendant was present and represented by the same counsel who represented him at trial, the proceedings were conducted before a judge, there was a record of the proceedings, and the defendant was afforded an opportunity to fully cross-examine the witness. In both Roberts and Green, the witness was examined by the defendant; in this case defendant declined to cross-examine, expressly denying waiver and stating he

was not prepared to cross-examine.[5/] The additional question raised by this case is the existence and effect of waiver of the opportunity to cross-examine. The Supreme Judicial Court reversed Tanso's convictions because it found that defendant did not avail himself of the opportunity to cross-examine the witness, and there was

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5/ While affirming the general principle that a defendant cannot be permitted to delay cross-examination until such time as, in his view, he is prepared, 411 Mass. at 648, 583 N.E.2d at 1252-1253, the lower court nevertheless reversed the conviction because the judge at the deposition proceeding did not inquire into how much time defendant needed for a "reasonable opportunity to cross-examine." Id. at 649, 583 N.E.2d at 1253. This Court has stated that such inquiries into "effectiveness" are not required and frustrate the very purpose of admitting prior testimony. Ohio v. Roberts, 448 U.S. at 73 n.12. Counsel in this case had represented defendant since arraignment and had attended a lineup identification, reviewed discovery, employed an investigator and visited the crime scene. (Tr. 3/7/86 at 77, 87-88). Compare Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (counsel appointed four days before prior testimony).

nothing to justify a finding that cross-examination had been waived. In giving such singular import to one -- albeit important -- factor in the reliability analysis, the lower court ignored the mandate in Idaho v. Wright, 110 S. Ct. 3139 (1990), that the government may rely on the totality of the circumstances surrounding the making of the statement to demonstrate that it has "particularized guarantees of trustworthiness." Id. at 3148, 3149. Nothing in Roberts or any decision of this Court has established that a lack of cross-examination is necessarily fatal to the admissibility of evidence under the Confrontation Clause. The test is not solely whether there was an opportunity for cross-examination, but whether there are adequate indicia of reliability to justify placing the hearsay statement before the jury. Opportunity to

cross-examine is but one of several factors which attend a totality of circumstances surrounding the giving of the statement. See United States v. Zannino, 895 F.2d 1 (1st Cir.), cert. denied, ___ U.S. ___, 110 S. Ct. 1814 (1990) (absent witness's testimony from codefendant's trial sufficiently reliable); Phillips v. Wyrick, 558 F.2d 489, 495 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) (absence of record of preliminary hearing not constitutionally foreclose admissibility). Its absence does not conclude the constitutional question.[6/]

6/ For example, prior recorded grand jury testimony, where there is neither cross-examination nor an opportunity to cross-examine, has been deemed admissible under the Confrontation Clause as well as Fed. R. Evid. 504(b)(5). See e.g., United States v. Zannino, 895 F.2d at 6 (rule in six Circuit Courts).

By its ruling, the lower court improperly constitutionalized a single element of the hearsay exception making it the determining factor in admissibility, and depriving the Commonwealth of its opportunity to prove that the circumstances of the prior testimony rendered it reliable.7/

The prosecutor claimed that defendant waived his opportunity to cross-examine the witness, relying on defendant's

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7/ Circumstances surrounding the making of the statement rendered it reliable under Roberts. The defendant, represented by counsel, was present to confront the witness who gave his testimony under oath, in the course of a judicial proceeding which was recorded and conducted by a judge. His counsel, who had been provided with all the discovery that the government had, interposed objections during direct examination, and had three days following the direct to prepare cross-examination. The declarant gave testimony as an eyewitness to the murders, approximately two weeks following the crimes. These circumstances render the declarant particularly worthy of belief. Idaho v. Wright, ___ U.S. ___, 110 S. Ct. at 3148, 3149.

assertion that he did not wish to cross-examine in order to preserve his argument that the Municipal Court had no jurisdiction to conduct the deposition, and unsupported complaints about having inadequate time to prepare. The lower court acknowledged that the government might satisfy its proof of reliability by showing the defendant has waived his opportunity to cross-examine the witness at the prior hearing. However, in ruling that no waiver of that opportunity can exist in the absence of a direct "judicial order to cross-examine the witness or forego the cross-examination," 411 Mass. at 646 n.7, 650, 353 N.E.2d at 1251 n.7, 1254, the lower court misapprehended the law of waiver and the role strategic decisions play in waiver questions, and created a situation where the government can rarely, if ever, prove waiver. This holding runs contrary to

the decisions of this and other appellate courts.

It is beyond question that a waiver of confrontation rights may take various forms, without a specific announcement that the right is being relinquished. E.g. Taylor v. Illinois, 414 U.S. 17, 20 (1973) (voluntary absence from trial); Illinois v. Allen, 397 U.S. 337 (1970) (contumacious conduct); cf. Brookhart v. Janis, 384 U.S. 1 (1966) (agreement not to cross-examine); United States v. Carlson, 547 F.2d 1346, 1358-1359 (8th Cir. 1976) (intimidating witness not to testify).[8/]

8/ The lower court also suggested the Commonwealth might be estopped from arguing waiver where it did not later offer the witness for cross-examination. 411 Mass. at 650, 583 N.E.2d at 1253-1254. Such a notion has no basis in any waiver inquiry. It is defendant's actions and the circumstances attending the waiver itself, not the government's actions, which are important to the issue of a defendant's waiver.

The ruling of the lower court, rejecting the government's claim of waiver for tactical reasons, conflicts with those in at least two other jurisdictions. In strikingly similar circumstances, the court in United States v. Johnpoll, 739 F.2d 702, 708, 710 (2d Cir.), cert. denied, 469 U.S. 1075, reh. denied, 469 U.S. 1197 (1984), concluded that the defendant waived his opportunity to cross-examine witnesses at a deposition when he and his attorney decided not to attend. Likewise, in United States v. Zurosky, 614 F.2d 779, 791, 793 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980), defendant's tactical decision not to cross-examine after having been informed of the risk the testimony might later be admitted did not violate his confrontation rights.

Waiver may be found, without explicit warnings, where there is limited

cross-examination at the prior hearing. E.g., United States ex rel. Bell v. Director, Department of Correction, 847 F.2d 349, 402 (7th Cir. 1988) (scope of permitted cross narrower than would be so at trial). A realistic opportunity to conduct cross-examination, not the extent to which it is conducted, is the hallmark of the confrontation right. E.g., Glenn v. Dallman, 635 F.2d 1183, 1186-1187 (6th Cir. 1980), cert. denied, 454 U.S. 843 (1981). "Once the opportunity for cross has been accorded the confrontation requirement is fulfilled. . . . The actual use then made of the opportunity becomes a matter of defense strategy, and deliberate trial tactics do not ordinarily exact constitutional protection." Phillips v. Wyrick, 558 F.2d at 496. See Strickland v. Washington, 466 U.S. 668, 690-691 (1984).

The Confrontation Clause guarantees the opportunity for cross-examination, not actual cross-examination or "cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985), citing Roberts, 448 U.S. at 73, n.12.

The requirements the lower court imposed on a finding of waiver in this case make no practical sense.[9/] The

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9/ In this case, the Supreme Judicial Court misapplied the principles it laid down to the facts of the case. The transcript of the preliminary hearing demonstrates that when the witness was offered for cross-examination, the judge specifically informed defendant that failure to cross-examine at that time might preclude him from ever cross-examining the witness, and that the judge spent time exhaustively reviewing the discovery provided to defendant. It was only after presenting the witness for cross, and assuring himself that the defendant knew the potential risk of declining cross-examination that the judge concluded the hearing. (Tr. 3/7/86 at 24-28, 166-168, 173).

effect of the decision below is to put total control of the opportunity to cross-examine within the defendant's power, allowing him to forgo cross-examination for tactical reasons or claimed unpreparedness, yet effectively preserve the right to exclude the evidence from trial should the witness become unavailable. It fosters abuse of the preliminary hearing or deposition process by permitting a defendant to delay committing himself to cross-examination or waiver until the witness dies or disappears.

The scenario constructed by the Supreme Judicial Court would require that a colloquy be conducted any time the defense did not cross-examine a witness at a preliminary hearing, which would include warning of the ultimate risk of failing to cross-examine, and a "hearing" into how prepared counsel was to cross-

examine or when he or she might be prepared to effectively cross-examine. This would unnecessarily burden and delay the process of preliminary hearings in already overcrowded courts, and completely frustrate the very purposes for which depositions are provided under state and federal criminal rules. And it is not required by the Sixth Amendment.

CONCLUSION

For all the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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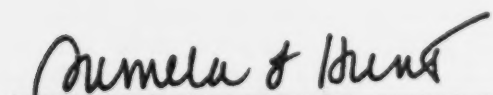

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APPENDIX A

COMMONWEALTH vs. PAUL TANSO.

Suffolk. November 5, 1991. - January 14, 1992.
Present: Liacos, C.J., Wilkins, Abrams, Nolan, & Lynch, JJ.

Homicide. Constitutional Law, Confrontation of witnesses, Assistance of counsel. Witness, Unavailability, Cross-examination. Evidence, Previous testimony of unavailable witness, Polygraphic test. Identification. Practice, Criminal, Grand jury proceedings.

Indictments found and returned in the Superior Court Department on May 21, 1986.

Pretrial motions were heard by Charles R. Alberti, J., and Robert W. Banks, J., and the cases were tried before Sandra L. Hamlin, J.

F. Lee Bailey (Kenneth J. Fishman and Peter Charles Horstmann with him) for the defendant.
Jane A. Sullivan, Assistant District Attorney, for the Commonwealth.

ABRAMS, J. The defendant, Paul Tanso, appeals from two convictions of murder in the first degree.1/ The main issue on appeal is the trial judge's admission in evidence, over objection, of the deposition testimony of an

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1/ Tanso was also convicted of unlawful possession of a handgun.

unavailable witness who had not been cross-examined. For the reasons stated in this opinion, we conclude that the defendant did not waive his right to cross-examine the witness. Therefore, the admission of the deposition testimony violated the defendant's right to confrontation under the Sixth Amendment to the United States Constitution.[2/] Accordingly, the defendant is entitled to a new trial.[3/] We also comment briefly on some of the issues likely to recur at retrial.

On February 19, 1986, at

2/ Because our conclusion is based on the Sixth Amendment to the Constitution of the United States, we do not discuss art. 12 of the Massachusetts Declaration of Rights.

3/ The defendant's motions for new trial based on Storella's reappearance and availability were denied. The defendant's sentences were stayed pending appeal of the denial of his motions for new trial and his convictions.

approximately 9:30 P.M., a double homicide occurred in a park in Boston's North End. The defendant was arrested on February 23, 1986, and arraigned the next day on complaints charging him and two codefendants with the February 19 murders. At trial, the Commonwealth's proof indicated that the defendant, along with codefendants Frank DiBenedetto and Louis Costa, killed John Bottari and Frank Angelo Chiuchiolo by firing weapons repeatedly into their bodies at close range. Two witnesses identified the defendant as one of the assailants. One, Joseph Schindler, testified that he observed part of the incident from his apartment window.

The other witness, Richard Storella, knew the defendants as well as the men who were killed. In a deposition before the Boston Municipal Court judge, Storella said that the victims had

planned to rob DiBenedetto. Storella said that he drove with the two victims to the park and observed the killings while standing outside of the park.

At a pretrial hearing on Monday, March 3, 1986, in the Municipal Court,[4/] the defendant waived his rights to a probable cause hearing, and the Commonwealth moved to depose Schindler and Storella pursuant to Mass. R. Crim. P. 35, 378 Mass. 906 (1979).[5/]

4/ Counsel for the defendant and a codefendant were both present at all the pretrial hearings discussed in this section; the third defendant was tried separately as a juvenile.

5/ Rule 35 of the Massachusetts Rules of Criminal Procedure states, in relevant part, "[w]henever due to exceptional circumstances, and after a showing of materiality and relevance, it is deemed to be in the interest of justice that the testimony of a prospective witness of the defendant or the Commonwealth be taken and preserved, the judge may at any time after the filing of a complaint or return of an indictment, upon his own motion or the motion of either party with notice to

(footnote continued)

In support of its motion, the Commonwealth presented evidence that weapons and ammunition had been seized from the homes of both the defendant and his codefendant, and that Schindler and Storella feared for their safety. The judge allowed the motion. At that point, Schindler was sworn and gave direct testimony before the judge, including an in-court identification of the defendant. At the close of Schindler's testimony, defense counsel stated that he was not prepared for cross-examination. The judge continued the proceedings until the next day, and said that he would order defense counsel "either to take cross-examination at that time or to waive it."

(footnote continued)

all interested persons, order that the testimony of the witness be taken by deposition . . . ."

The next day Storella gave direct testimony in a deposition before the Municipal Court judge. Defense counsel said that he still was not prepared to cross-examine. Defense counsel stated that he believed that any cross-examination that he might conduct at that time would constitute ineffective assistance of counsel in violation of his client's Sixth Amendment rights. The Commonwealth countered that the defendant did, in fact, have the opportunity to conduct an effective cross-examination on that day, and that, if the defendant refused to do so, "it is only for the purpose of tactics . . . so that [the defendants] will be in a position, should the witness be executed, to say, 'We did not have effective cross examination; you cannot use that testimony.'"

The defendant moved to hold Schindler and Storella, the Commonwealth's rule 35

witnesses, in protective custody as material witnesses until such time as the defense had an opportunity to cross-examine them. The defendant also asked for full discovery.[6/] The judge denied both defense requests, and continued the proceedings until that Friday, March 7.

On Friday, defense counsel once again indicated to the judge that he was not prepared to cross-examine, and asked for a continuance. The Commonwealth opposed the continuance, representing that it had provided all discovery in its possession to defense counsel at 5 P.M. on the previous Tuesday, March 4. The Commonwealth asked the judge to rule that, in declining to cross-examine on

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6/ At that time, defense counsel had received as discovery a redacted search warrant, an incident report from the police, and a statement alleged to be a transcript of a tape recorded interview of Schindler.

that day, the defendant had waived his right to cross-examine Storella. Defense counsel expressly stated that they did not waive cross-examination of Storella. Although earlier the judge had indicated that he would order the defendant to cross-examine the witnesses or waive the right to cross-examination if he did not avail himself of the opportunity, the judge instead declined to rule on both the defendant's and the Commonwealth's requests. Saying that he would "leave [the defendants] to whatever remedies may exist," he bound the case over to the grand jury.

The indictments were returned on May 21, 1986. The defendant filed a motion on October 17, 1986, in the Superior Court requesting permission to complete the rule 35 depositions through cross-examination. At that hearing, the Commonwealth argued that the defendant

had waived his cross-examination rights by failing to avail himself of his earlier opportunity (in the Municipal Court) to cross-examine the witnesses. The Superior Court motion judge allowed the defendant's motion. He ordered that the subsequent deposition consist of cross- and redirect examination only, and that it be completed by December 5, 1986. Schindler was cross-examined on December 2, but Storella never was cross-examined because the Commonwealth asserted that it was unable to locate him. When Storella still had not been located by March, 1987, a capias was issued for his arrest.

On January 21, 1988, the defendant moved to exclude Storella's testimony. On February 8, 1988, the Commonwealth moved to have Storella declared unavailable and for permission to use his rule 35 deposition at trial against the

defendant. A second Superior Court judge, without holding an evidentiary hearing, allowed the Commonwealth's motion and denied the defendant's motion. He determined that the defendant had been "provided with an adequate opportunity to effectively cross-examine" Storella and that Storella's testimony was "sufficiently reliable."

The trial judge, in a hearing regarding Storella's availability and the admissibility of his rule 35 testimony, found that Storella was unavailable and that the defendant had waived his right to cross-examine Storella. The judge admitted Storella's rule 35 testimony.

1. The rule 35 deposition testimony and waiver. The defendant argues that, as soon as he waived the probable cause hearing, the case no longer was within the jurisdiction of the Municipal Court and, therefore, the Municipal Court judge

was without authority to allow the Commonwealth leave to take rule 35 depositions. This argument is without merit. The case remains within the court's jurisdiction until an indictment is returned. Any other rule would place cases outside of the jurisdiction of any court between the time when a probable cause hearing is waived or held in the District or Municipal Court and the indictment is returned in the Superior Court. The Municipal Court judge had jurisdiction and discretionary authority to allow the motion to depose the witnesses.

The defendant next argues that the Municipal Court judge erred in allowing the Commonwealth's motion to depose witnesses pursuant to rule 35 because, the defendant claims, the Commonwealth did not set forth sufficient grounds for allowing the depositions. This argument,

too, is without merit. Rule 35 of the Massachusetts Rules of Criminal Procedure was written in substantial conformity with Fed. R. Crim. P. 15. See Reporters' Notes to Mass. R. Crim. P. 35, Mass. Gen. Laws Ann., Rules of Criminal Procedure at 633 (West 1980). Both rules allow the testimony of prospective witnesses to be taken prior to trial in "exceptional circumstances" when "the interest of justice" so requires. See note 5, supra. "[P]hysical unavailability [is] but one factor in determining whether 'exceptional circumstances in the interests of justice' exist." United States v. Johnson, 752 F.2d 206, 209 (6th Cir. 1985). The Commonwealth presented evidence that: (1) both Schindler and Storella feared for their safety; (2) weapons and ammunition had been seized from the homes of two of the defendants; (3) Schindler lived in the defendants'

neighborhood; and (4) Storella was acquainted with the defendants and played a role, albeit a supporting one, in the crime. In these circumstances, the Municipal Court judge could conclude that the Commonwealth legitimately was concerned that the witnesses might be unwilling or unable to testify at trial, and that this concern could be alleviated by allowing the Commonwealth's rule 35 motion. Cf. id. (taking of deposition was proper where defendant refused to testify at trial due to fear for his own and his family's safety).

The standard for reviewing a trial court judge's ruling on a rule 35 motion is abuse of discretion. United States v. Keithan, 751 F.2d 9, 12 (1st Cir. 1984). The judge did not abuse his discretion in allowing the Commonwealth's rule 35 motion. Even if the Commonwealth's evidence had been less compelling, we

likely would find no abuse of discretion because, "[w]hen the question is close[,] a court may allow a deposition in order to preserve a witness' testimony, leaving until trial the question of whether the deposition will be admitted as evidence." United States v. Mann, 590 F.2d 361, 366 (1st Cir. 1978). Indeed, ordering the deposition and requiring the cross-examination may well insure the safety of witnesses.

The defendant argues that the trial judge erred in admitting the uncross-examined deposition testimony in violation of the defendant's confrontation rights. We agree. Prior recorded testimony, if it meets certain conditions, may be admitted at trial. In order not to run afoul of the defendant's confrontation rights under the Sixth Amendment, it should be admitted only if it has been established that (1) the

witness is unavailable to testify,[7] and (2) the prior testimony bears sufficient indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). Accord Commonwealth v. Siegfriedt, 402 Mass. 424, 427 (1988); Commonwealth v. Trigones, 397 Mass. 633, 637 (1986); Commonwealth v. Bohannon, 385 Mass. 733, 741 (1982).

A witness's prior recorded testimony bears adequate indicia of reliability for confrontation clause purposes if opposing counsel had an adequate opportunity to cross-examine the witness and availed himself or herself of that opportunity at

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7/ In the absence of either cross-examination or a judicial order to cross-examine the witness or forgo the cross-examination, there is no foundation on which to base the defendant's waiver of his right to cross-examine. Therefore, we do not reach or discuss whether the witness was unavailable. The facts are conflicting, and we, of course, do not resolve factual disputes.

the prior hearing. Ohio v. Roberts, supra at 73. Accord Bohannon, supra at 747. However, actual cross-examination, while usually sufficient, is not necessary to satisfy the reliability component. A reasonable opportunity to cross-examine also may render the testimony admissible. See United States v. Zurosky, 614 F.2d 779, 793 (1st Cir. 1979) cert. denied, 446 U.S. 967 (1980) (defense counsel had meaningful opportunity to question witness, but made tactical decision not to do so; therefore, his confrontation rights were not denied); Phillips v. Wyrick, 558 F.2d 489, 496 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) ("Once the opportunity to cross-examine has been accorded, the confrontation requirement is fulfilled. . . . The actual use then made of the opportunity becomes a matter of defense strategy, and deliberate trial

tactics do not ordinarlily exact constitutional protection" [citations omitted]). Our cases discussing the right to cross-examination under the Sixth Amendment to the United States Constitution are in accord. See Commonwealth v. Ortiz, 393 Mass. 523, 532 (1984) ("The prior testimony of the currently unavailable witness must have been given 'in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered'" [emphasis added], quoting Commonwealth v. Meech, 380 Mass. 490, 494 [1980]; Commonwealth v. Martinez, 384 Mass. 377, 381 (1981) (one of the elements necessary to make grand jury testimony of unavailable witness admissible is

"opportunity for cross-examination of the witness at the prior hearing by a person against whom the testimony is being offered" [emphasis added]); Commonwealth v. Canon, 373 Mass. 494, 501 (1977), cert. denied, 435 U.S. 933 (1978) ("We do not think the [Supreme] Court intended to lay down an absolute requirement of actual cross-examination as well as adequate opportunity for cross-examination for cases like the present in which there was no problem of ineffective assistance of counsel"); Andrews, petitioner, 368 Mass. 468, 476-477 (1975) (admission of prior testimony does not violate Sixth Amendment confrontation clause where defense counsel declined opportunity to examine witness at prior hearing).

The central purpose of rule 35 is to "preserve evidence. . . . While it is true that it is far more desirable to

secure the actual presence of a potential witness in criminal cases, there are situations in which the use of depositions is required in order to assure that the ends of justice are met, e.g., when a witness' attendance cannot be secured . . . ." Reporters' Notes to rule 35(a). Thus, the defendants are not entitled to delay cross-examination until such time as, in their view, they have a "reasonable opportunity to cross-examine." Such an interpretation would vitiate rule 35. The question whether there was a "reasonable opportunity to cross-examine" is for the court. Cross-examination, to pass muster under the confrontation clause, does not have to be a perfect cross-examination. See Delaware v. Fensterer, 474 U.S. 15, 20 (1985) ("Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-

examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" [emphasis in original]); Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (the right to cross-examine "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process"). Our cases are in accord. See Commonwealth v. Siegfriedt, supra at 429 ("fact that there may have been a more extensive cross-examination . . . does not undermine the reliability of the otherwise trustworthy, previously recorded testimony so as to preclude its admission"); Commonwealth v. Trigones, 397 Mass. 633, 639 (1986) (prior testimony is sufficiently reliable even though defendant did not adequately pursue opportunity to cross-examine witness on bias); Commonwealth v.

Mustone, 353 Mass. 490, 494 (1968) ("If [the defendants] failed to cross-examine any witness fully at the probable cause hearing, they necessarily assumed the risk that the witness would die or become unavailable before trial, so that his initial testimony could be admitted at trial"); Commonwealth v. DiPietro, 4 Mass. App. Ct. 845 (1976), S.C., 373 Mass. 369 (1977) ("It is immaterial that for tactical reasons the defendant did not cross-examine his girl friend in greater depth at [the earlier hearing]. The constitutional requirement is satisfied if the defendant is afforded the opportunity of cross-examination" [footnote omitted]). Once the judge sets a reasonable deadline for the defendant to cross-examine the witness, the defendant cannot delay cross-examination by arguing that his cross-examination would be better if he were given more

time to prepare, for this will always be so.

The Municipal Court judge could have and should have set a deadline by which the defendant had to cross-examine the witness or waive his right to do so. However, he did not. That failure is fatal to the Commonwealth's claim of waiver. The Municipal Court judge did not hold a hearing on the time needed for a "reasonable opportunity to cross-examine." He did not rule that the defendant had had a reasonable opportunity to cross-examine. He did not give any notice to the defendant that failure to cross-examine by a certain date could be or would be viewed as a waiver of the right to cross-examine the witness. The judge should have resolved the dispute and set a date for cross-

examination;[8] instead, he merely left the parties to their own remedies.

"[T]he decisions of [the United States Supreme Court] and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. . . . There are few subjects, perhaps, upon which [the Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and

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8/ The defendant asserts that he did not want to cross-examine the witness to preserve his argument that the Municipal Court lacked jurisdiction once the defendant waived the probable cause hearing. The judge still should have ordered cross-examination by a date certain. The defendant could have cross-examined the witness while preserving his objection or forgone the opportunity to cross-examine and relied on his jurisdictional argument.

fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 404-405 (1965).

The proceedings in the Municipal Court were in early March. The indictments were returned in May, 1986. After the Municipal Court proceedings, the Commonwealth never moved to complete the deposition. It was only after the defendant filed a motion to complete the deposition in October, 1986, that the issue was again raised in the Superior Court. By the time a Superior Court motion judge finally set a deadline for completion of the depositions, Storella could not be found.[9/] In view of Storella's importance to the

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9/ Although the defendant contests this fact, we accept the Commonwealth's version of the events for the purposes of deciding this issue. See note 7, supra.

Commonwealth's case, the Commonwealth's position that, in these circumstances, the defendant had been afforded a fair opportunity to cross-examine is untenable. The defendant was not given any notice that failure to cross-examine Storella by a certain date would result in a waiver of the right to cross-examine.

The defendant at no time expressly waived his right to cross-examine; on the contrary, he objected each time the Commonwealth argued that his actions constituted a waiver. Absent a direct order to complete or forgo cross-examination, there was no basis for the subsequent determination that the defendant had waived cross-examination. Therefore, it was error to admit Storella's uncross-examined deposition testimony.

2. Issues that may arise at retrial. We discuss the following claims

of error raised by the defendant because they may arise at retrial.

a. Polygraph evidence. The defendant filed a motion for a polygraph examination and to have the results admitted in evidence. The defendant's request was denied. The defendant argues that the motion judge erred in denying his motion for a court-ordered polygraph examination. This argument is disposed of by our holding in Commonwealth v. Mendes, 406 Mass. 201, 202 (1989) (polygraph evidence inadmissible either to prove innocence or guilt or to impeach or corroborate testimony).

b. Schindler's in-court and out-of-court identifications of the defendant. The defendant participated in one of three separate videotaped lineups conducted on February 28, 1986, pursuant to an order of a judge of the Municipal Court. Schindler watched the lineups

through a one-way mirror. Schindler was then escorted out of the viewing area to make his identifications. Defense counsel, although present at the lineups,[10/] did not ask to be present when Schindler made the identifications. Subsequently, during his rule 35 deposition, Schindler identified the defendant from among those seated in the spectators' section of the courtroom as one of the perpetrators. The defendant argues that, because (1) Schindler was a former Middlesex County assistant district attorney, presumably familiar with lineups; (2) the murders occurred in the North End, "the renowned hub of Boston's Italian American community"; (3) no other participants with Italian

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10/ At the time of the lineup, defense counsel asked that his client be allowed to change places with another participant in the lineup. The Commonwealth agreed to this request.

looking features or last names allegedly were included in the lineup; (4) the defendant's dark hair, eyes and complexion allegedly identify him as being of Italian lineage; (5) all the other participants in the lineup were over five feet, six inches tall, and Schindler had described one of the individuals he viewed on the night of the shooting as having a height as short as five feet, four inches; and (6) the defendant's long hair and slight build allegedly distinguished him from the other participants in the lineup, the out-of-court lineup was unnecessarily suggestive. He also argues that Schindler's observations were unreliable, and that he had a right to have counsel present when Schindler identified the defendant at his postlineup interview. As a result, he argues, due process mandates the suppression of both identifications.

"The burden is on the defendant to establish by a preponderance of the evidence that impermissibly suggestive procedures were used at the lineup." Commonwealth v. Simmonds, 386 Mass. 234, 239 (1982), citing Commonwealth v. Botelho, 369 Mass. 860, 867 (1976). The fact that each person in the lineup may not have closely resembled the defendant does not render the lineup impermissibly suggestive. Cf. Commonwealth v. Melvin, 399 Mass. 201, 207 (1987) (fact that defendant was only person in photographic array wearing a sling held not to constitute unnecessary suggestiveness, even though witness had seen defendant injuring his shoulder during commission of the crime); Simmonds, supra at 240 (no unnecessary suggestiveness found where defendant was one of only three members of seven-person lineup without a moustache, and several of lineup members

wore standard, police-issued pants). Absent error on the part of the judge, his factual findings stand. Commonwealth v. Correia, 381 Mass. 65, 76 (1980). However, "[o]ur appellate function requires that we make our own independent determination on the correctness of the judge's 'application of constitutional principles to the facts as found.'" Commonwealth v. Jackson, 377 Mass. 319, 325 (1979), quoting Commonwealth v. Haas, 373 Mass. 545, 550 (1977). Because the out-of-court lineup was not unnecessarily suggestive, it did not "taint" the in-court identification. Botelho, supra at 865.

The judge who denied the motion to suppress the identification testimony, after reviewing the videotape, found that (1) the majority of the lineup participants were young white males all of whom had one or more dark features;

(2) at least five other members of the lineup were similar in height to the defendant; and (3) at least two other members had hair of the same length as the defendant's. The judge properly rejected the defendant's argument that Schindler's experience as a former assistant district attorney gave him special knowledge of lineup procedures that would cause him to single out the defendant. There is no evidence in the record to support that argument. After reviewing the videotape, we conclude that the judge's findings are supported by the evidence. The lineup procedure was not unnecessarily suggestive, it did not "taint" the in-court identification. Botelho, supra at 865.

Because we conclude that the identification was not unnecessarily suggestive, it is unnecessary for us to reach the question whether Schindler's

identification meets the "reliability test." See Commonwealth v. Venios, 378 Mass. 24, 25 (1979). We note, nevertheless, that a review of the record also supports the judge's findings that Schindler's observations were reliable. From his apartment overlooking the park where the murders occurred, at a distance of approximately fifty feet, Schindler observed the defendant descend a stairwell which was illuminated by a lamp at its top. The defendant was moving toward Schindler at the time. Schindler paid close attention to the events he observed in the park, and was able to describe the defendants' clothing and hair color to the police. The lineup took place nine days after the incident.

In Commonwealth v. Charles, 397 Mass. 1, 5 (1986), without deciding whether we would adopt the rule ourselves, we noted that the rationale behind decisions which

have held that a defendant has a right to have a counsel present at a postlineup interview is to enable defense counsel to "ensure that the procedure does not suggest who the prosecutor believes committed the crime." The short answer to defendant's argument that he has been deprived of his due process rights because counsel was not present during Schindler's postlineup interview is apparent from viewing the videotape of the lineup proceedings. The defendant's counsel, who was present at the lineup and could have asked to be present at the interview, did not request to be present and did not seek a court order allowing him to be present.[11/]

11/ We note that counsel for the defendant did raise other unrelated objections to the lineup on that occasion. Earlier that day the defendant petitioned, pursuant to G.L. c. 211, §3, a single justice of this court for relief

(footnote continued)

Moreover, the defendant is unable to show that Schindler's identification was a product of any suggestion, urging, or questioning on the part of the prosecutor.

The majority of Federal courts that have considered whether the defendant has a right to counsel at a postlineup interview of a witness have found that no such right exists. See Hallmark v. Cartwright, 742 F.2d 584, 585 (10th Cir. 1980); United States v. White, 617 F.2d 1131, 1135 (5th Cir. 1980); United States v. Bierey, 588 F.2d 620, 624-625 (8th Cir. 1978), cert. denied, 440 U.S. 927

(footnote continued)

from the Municipal Court judge's order that a lineup be conducted. The defendant objected to (1) the lack of a pre-lineup evidentiary hearing; (2) the fact that the identity of the witnesses would not be disclosed at the lineup; and (3) the lack of notice to the defendant. Relief was denied. Counsel for the defendant renewed his objections following the lineup, but did not request to be present at the postlineup interview.

(1979); United States v. Tolliver, 569 F.2d 724, 728 (2d Cir. 1978); United States v. Parker, 549 F.2d 1217, 1223 (9th Cir.), cert. denied, 430 U.S. 971 (1977); United States v. Cunningham, 423 F.2d 1269, 1274-1275 (4th Cir. 1970). See also Graham v. United States, 377 A.2d 1138, 1140 (App. D.C. 1977), cert. denied, 434 U.S. 1022 (1978). In Commonwealth v. Charles, supra at 6, we noted that, although it was unnecessary for us to decide the issue, these cases "holding that defense counsel does not have a right to be present at a post-lineup interview would appear to represent the better reasonsed view." We will not consider a different rule for Massachusetts in the absence of any objection, request to the court for an order, or other evidence in the record that such a request was made prior to the lineup.

At the hearing on the defendant's motion to suppress the in-court and out-of-court identifications, defense counsel sought to question one of the investigating police officers about the lighting conditions at the crime scene and Schindler's view of the area on the night of the murders. The defendant sought to pose these questions in order to cast doubt on the reliability of Schindler's observations. The judge ruled that these were questions of fact for the jury and ordered the defendant's counsel to restrict his questions to the issue of the identification procedure. The defendant argues that the motion judge erred in so limiting his cross-examination. The reliability of Schindler's observations is an issue in a motion to suppress only if the identification procedure is found to be unduly suggestive -- which is not the

case here. See Venios, supra at 25. There was no error.

c. The defendant's motion to dismiss the indictments. The defendant argues that the motion judge erred in failing to dismiss the grand jury indictments against him. The basis of this argument is that the grand jury should have been apprised of certain allegedly exculpatory evidence. One item of allegedly exculpatory evidence consisted of the defendant's polygraph results. As to this piece of evidence, the defendant's argument is disposed of by our holding in Mendes, supra. The other allegedly exculpatory evidence consisted of a prior, allegedly inconsistent statement made by Storella[12/] and a statement made by another witness that contradicted

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12/ Storella initially denied any involvement whatsoever in the murders.

one aspect (not directly related to the murders) of Storella's testimony.[13/]

The Commonwealth "is not required to present all possibly exculpatory evidence to a grand jury." Commonwealth v. Connor, 392 Mass. 838, 854 (1984). The Commonwealth, however, is required to alert the grand jury to "exculpatory evidence that would greatly undermine the credibility of an important witness." Commonwealth v. Mayfield, 398 Mass. 615, 620-621 (1986), citing Connor, supra at 854. While there is no doubt that Storella was an important witness, the allegedly exculpatory evidence was not of that nature. Furthermore, the grand jury was informed that Storella was testifying in exchange for immunity from prosecution

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13/ Michael Pittore, an acquaintance of Storella, denied Storella's allegation that they had had a conversation with one of the victims concerning whether DiBenedetto still sold cocaine.

for conspiracy to commit robbery. There was no error.

The judgments are reversed, the verdicts set aside, and this case is remanded to the Superior Court for a new trial.

So ordered.

APPENDIX B

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
Room 1412 Court House
Boston, Massachusetts 02108
(617) 725-8055

Jean M. Kennett
Clerk

February 6, 1992

Kenneth J. Fishman, Esquire
F. Lee Bailey, Esquire
Peter Charles Horstmann, Esquire

Dear Attorney Fishman:

Re: SJC-5121
COMMONWEALTH vs. PAUL TANSO
Decided: 1/14/92

Your petition for Rehearing of the above-captioned appeal has been considered by the Court and is Denied.

Very truly yours,

Jean M. Kennett
Clerk

cc: Jane Sullivan, A.D.A.
David Mark, A.D.A.
James Hamrock, A.D.A.
New Courthouse
Boston, MA 02108

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
NO. 5121

COMMONWEALTH OF MASSACHUSETTS

v.

PAUL TANSO

MOTION TO STAY ISSUANCE OF RESCRIPT

Now comes the Commonwealth in the referenced case and moves that this Court stay issuance of the rescript. As grounds therefor, the Commonwealth says that it intends to petition the United States Supreme Court for a writ of certiorari in this case. The stay is requested to remain in effect until after all proceedings in the United States Supreme Court are concluded. If the

Commonwealth determines not to pursue the petition, it will promptly notify the Court.

Respectfully submitted,

For the Commonwealth

SCOTT HARSHBARGER
Attorney General

Pamela L. Hunt
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2826
BBO #244520

Date: February 3, 1992

Received
Supreme Judicial Court
Allowed
Feb. 3, 1992
By the Court

For the Commonwealth
Jean M. Kennett, Clerk

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CRIMINAL ACTION
NOS. 058214,
058215, 059126

COMMONWEALTH OF MASSACHUSETTS

vs.

PAUL TANSO

MEMORANDUM AND RULING ON DEFENDANT PAUL TANSO'S MOTION IN LIMINE TO EXCLUDE PRIOR TESTIMONY OF COMMONWEALTH WITNESS

INTRODUCTION

Defendant Paul Tanso (Tanso) has been indicted for first degree murder of Joseph Bottari and Frank Chiuchiolo. Tanso has moved that the court exclude from admission at trial the deposition testimony of the Commonwealth's witness Richard Storella (Storella), conducted pursuant to Mass. R. Crim. P. 35 on March 3 and 4, 1986 in the Boston Municipal Court. In opposition, the Commonwealth

has moved to declare Storella unavailable and to be allowed to use the deposition transcript of Storella against Tanso at trial.

FACTUAL BACKGROUND

Tanso was arrested on February 23, 1986 and arraigned on February 24, 1986. Tanso and co-defendant Frank DiBenedetto (DiBenedetto) were scheduled to appear at a probable cause hearing on Monday, March 3, 1986. A third co-defendant Louis Costa (Costa), then a juvenile, was not scheduled to appear at the hearing.

On March 3, 1986 counsel for Tanso and DiBenedetto elected to move to waive the the probable cause hearing. The Commonwealth then moved that the District Court conduct a deposition of two Commonwealth witnesses pursuant to Mass. R. Crim. P. 35 because the Commonwealth feared for their safety. The District Court allowed the motion and proceeded

with the deposition. Defendants' counsel objected selectively and aggressively during proceedings and argued points at issue throughout the direct examination of the deponent.

The District Court judge informed both defendants' counsel that, after the direct examination cf the first witness Schindler, he would entertain a request for time to prepare for cross-examination. At that time, he inquired of both defendants whether they wanted additional time to prepare for cross-examination at the close of Schindler's testimony. Tanso's counsel and DiBenedetto's counsel each stated that he was not prepared for cross-examination.

The judge continued the proceedings until the next day. At that time, Tanso's counsel said he was not prepared to cross-examine. DiBenedetto's counsel

took a similar position. In addition, both counsel argued that for purposes of a Rule 35 deposition, defense counsel should be able to obtain the same discovery as for trial. The Commonwealth argued that effective cross-examination did not necessarily require that all discovery be available to defendants.

At that time the defense counsel indicated they had received a redacted search warrant, an incident report from police and a transcript of a statement made by an eye witness (Schindler). Tanso's counsel and DiBenedetto's counsel declined the opportunity to cross-examine the Commonwealth's first witness, Schindler, and the court proceeded with the deposition of the Commonwealth's second witness, Storella. Tanso's counsel and DiBenedetto's counsel also declined the opportunity to cross-examine Storella.

At the close of the proceedings on Tuesday, March 4, 1986 the Commonwealth suggested a continuance until Friday of that week to enable defense counsel to have an opportunity to investigate the information elicited from the two witnesses and to go over the reports previously provided to them and any subsequent material which might come into their possession. Counsel renewed their request for full discovery. DiBenedetto's counsel stated he would not be ready to cross-examine on Friday and stated that he could offer no date until complete discovery was obtained. The Commonwealth, then agreed to provide further discovery at 5 p.m. that afternoon.

The proceedings reconvened on Friday, March 7th at which time the Commonwealth represented that it had provided all discovery in its possession to the

defense counsel at 5 p.m. on Tuesday and that the Commonwealth was not withholding any information from the defendants. The court again provided the defendants' counsel the opportunity to cross-examine both witnesses. DiBenedetto's counsel declined the opportunity, stated he was not prepared and requested a continuance until the following week. Tanso's counsel also declined the opportunity to cross-examine stating that he was not prepared.

The judge in discussion with counsel raised a concern about the reason for permitting the depositions, i.e. the safety of the witnesses. He then terminated the deposition proceedings and stated the court was leaving each of the parties to his various remedies. The case was then the bound over.

On October 16, 1986, Tanso and DiBenedetto filed a motion in Superior

Court requesting the court to permit them to "complete" the depositions of the two witnesses begun in March. The Superior Court Judge (Alberti, J.) allowed the motion on November 6, 1986 and ordered the deposition be completed by December 5, 1986. The witness Schindler was deposed on December 2, 1986. However, the witness Storella had disappeared and it was impossible for the Commonwealth to produce him.

This court considers Judge Alberti's order to have had the effect of permitting a subsequent deposition if the deponents were then available. The order did not imply that the District Court judge's termination of the deposition proceedings in any way impaired the use of the testimony given at those proceedings as prior reported testimony in subsequent proceedings.

DISCUSSION

Tanso along with DiBenedetto has moved to exclude Storella's testimony on three grounds: (1) that the District Court lacked jurisdiction over the case at the time it granted the Commonwealth's motion under Rule 35; (2) that the District Court did not comply with the requirements of Rule 35; and (3) that introduction of Storella's testimony would violate the defendants' rights to confrontation under the Sixth Amendment and art. 12 of the Declaration of Rights.

The question of whether the District Court had jurisdiction over the case is answered by referring to the rule itself and examining the events in District Court. First, the rule contemplates that a District Court judge has the authority to order a deposition under Rule 35. The heading of the rule indicates it applies to both District Court and Superior

Court. In addition, the rule states, "[T]he judge may at any time after the filing of a complaint . . . order that the testimony of the witness be taken by deposition. . ." Mass. R. Crim. P. 35(a).

Second, in addition to having authority to order the deposition, the District Court had jurisdiction over the case when it allowed the deposition to proceed. The transcript indicates the District Court had not yet bound over the two defendants to Superior Court when it allowed the Commonwealth's Rule 35 motion. Thus, although Tanso had moved to waive a probable cause hearing, the District Court still retained its jurisdiction over the case and could exercise it authority under Rule 35 to grant the Commonwealth's motion.

Tanso next contends that Storella's testimony should be excluded because the district court's conduct of the

deposition was improper because the Commonwealth failed to comply with the requirements of Rule 35. The defendants argue the Commonwealth (1) failed to demonstrate exceptional circumstances; (2) the Commonwealth failed to comply with Rule 35's notice provisions; and (3) the District Court conducted the deposition unlawfully.

With regard to whether the Commonwealth adequately demonstrated that the depositions were required by "exceptional circumstances," this court will not substitute its judgment for that of the District Court. With respect to whether the Commonwealth complied with the notice provisions, the court notes that the rule contemplates two types of notice: "reasonable written notice" by the moving party to all interested persons regarding the time and place for taking the deposition, Mass. R. Crim. P.

35(c), and "reasonable notice" by the clerk of the time set for hearing motions filed. Mass. R. Crim. 35(h)(1). Reasonable written notice given to all interested parties regarding the time and place of the deposition is designed to insure the defendant's presence at the deposition and to provide reasonable time for preparation. Although formal written notice was not provided to the defendants, Tanso and counsel were present at the deposition. With regard to having an opportunity to prepare, Tanso was not prejudiced by lack of notice. Tanso's counsel was there for a scheduled evidentiary probable cause hearing, and he had a reasonable opportunity to examine substantial discovery information and to cross-examine the witnesses. The deposition began on Monday, continued on Tuesday and continued again on Friday.

The second type of notice contemplated by the court is that given by the clerk "of the time set for hearing motions filed" under Rule 35. Rule 35 indicates the judge has the discretion to forgo a hearing on the motion and go forward on the basis of the supporting affidavit. "In determining a motion filed pursuant to this rule, the judge may order a hearing or may determine whether exceptional circumstances exist and the materiality and relevance of the testimony on the basis of the supporting affidavit." Mass. R. Crim. P. 35(a) (emphasis supplied). Thus, the judge could proceed, without a hearing and upon affidavit, to order the deposition.

Finally, the court finds nothing unlawful in the manner in which the District Court judge presided over the deposition. As discussed above, the District Court judge had proper

jurisdiction over the case. In addition, it is implied in Rule 35 that the judge has authority to set the place of the deposition. Furthermore, the fact that the district court judge presided over the deposition provided additional protection for the defendants which we note the defendants took advantage of with numerous objections. Finally, the District Court judge had authority to conduct the identification procedure in which Tanso participated. Tanso's motion to waive a probable cause hearing had not been ruled on and his presence was required in court.

Tanso's final argument is that introduction of Storella's testimony would violate his rights under the Sixth Amendment and art. 12 of the Declaration of Rights. "The confrontation clause of the Sixth Amendment to the United States Constitution, applied to the states

through the Fourteenth Amendment, see Pointer v. Texas, 330 U.S. 400, 403 (1965), secures to a defendant in a criminal case the right 'to be confronted with the witness against him.'" Commonwealth v. Bohannon, 385 Mass. 733, 740 n.7 (1982). Article 12 of the Massachusetts Declaration of Rights also provides that a criminal defendant has a right "to meet the witnesses against him face to face." As the Commonwealth is seeking to introduce the prior reported testimony of a witness not subject to cross-examination at trial, the requirements of the Sixth Amendment must be met. The Commonwealth is obliged to show that the witness is not only unavailable . . . but also that his transcribed testimony "bore adequate 'indicia of reliability." Commonwealth v. Trigones, 397 Mass. 633, 637 (1986)

quoting Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).

Generally, the reliability of hearsay "can be inferred without more in a case where the evidence falls within a firmly rooted exception." Trigones, 397 Mass. at 637-38 quoting Roberts at 66. Otherwise, the evidence is admissible only if the prosecution "makes 'a showing of particularized guarantees of trustworthiness.'" Id. at 638 quoting Roberts at 66. "Although prior reported testimony may qualify as an exception to the hearsay rule," Commonwealth v. Bohannon, 385 Mass. 733, 741 (1982), the Supreme Judicial Court has stated that "in order to safeguard a defendant's constitutional right of confrontation, judges should only admit prior testimony which bears sufficient indicia of reliability and which furnishes the trier of fact with an adequate basis for

determining the veracity of the prior statements." Commonwealth v. Ortiz, 393 Mass. 523, 531-32 (1984). Whether the defendant had an opportunity and a similar motive for cross-examining the witness at the prior proceeding are the two factors which "appear to give the testimony reported at the former proceeding sufficient reliability" to meet the requirements of the Sixth Amendment. Ortiz, 393 Mass. 523, 535.

Whether Tanso had a similar motive to cross-examine Storella at the Rule 35 deposition is not at issue. However, Tanso and DiBenedetto argue that they were deprived of an opportunity to cross-examine Storella. This court disagrees. The District Court provided Tanso a reasonable opportunity to cross-examine Storella.

By the end of Tuesday, March 4, 1986 Tanso's counsel had received all

discovery in the possession of the Commonwealth and had had the opportunity to hear the direct testimony of both witnesses. Tanso's counsel had also attended a line-up and knew that Schindler had independently identified his client as a result of that line-up. By Friday, March 7, 1986, Tanso's counsel had been offered an adequate opportunity to effectively cross-examine the witnesses. Tanso's counsel with the consent of Tanso, chose not to use the opportunity to cross-examine Storella or Schindler - a decision this court infers was based on strategy. The decision to move to waive the probable cause hearing bolsters the court's view as does Tanso's counsel's total failure to move to cross-examine the witnesses for a period of seven months after the District Court judge terminated the proceedings.

The remaining question is whether an opportunity to cross-examine Storella - absent actual cross-examination - satisfies the indicia of reliability requirement of the Confrontation Clause. Although, the Supreme Court has expressly left this question unanswered, see Roberts, 448 U.S. at 61-62, Trigones, 397 Mass. at 638, this court believes it does.

In Commonwealth v. Canon the Supreme Judicial Court stated that it did "not think the Court intended [in Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)] to lay down an absolute requirement of actual cross-examination as well as adequate opportunity for cross-examination for cases . . . in which there was no problem of ineffective assistance of counsel." 373 Mass. 494, 501 (1977), cert. denied, 446 U.S. 967 (1980). See also Bohannon, 385 Mass. at 733 n.12 citing Canon ("actual cross-examination at prior trial

not required, opportunity to cross-examine sufficient"). Moreover, the Supreme Court has recognized the role that trial strategy plays in defense counsel's utilization of the opportunity to cross-examine witnesses. The Court stated that "[g]enerally the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis in original). Lower federal courts that have considered the question also have generally concluded that the opportunity for cross-examination is sufficient. See, e.g. United States v. Zurosky, 614 F.2d 779, 793 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980). As one Circuit Court of Appeals has stated, "The actual

use . . . made of the opportunity becomes a matter of defense strategy, and deliberate trial tactics do not ordinarily exact constitutional protection." Phillips v. Wyrick, 558 F.2d 489, 496 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978). Finally, independent of the "indicia of reliability" inherent in Storella's prior reported testimony, his testimony was corroborated by Schindler's eye-witness testimony and Schindler's in-court and out-of-court identifications of all three defendants.

This court therefore concludes that because Tanso was provided with an adequate opportunity to effectively cross-examine Storella, admission of Storella's testimony at trial will not violate Tanso's Sixth Amendment Rights.

Having determined Storella's testimony is sufficiently reliable to

satisfy the requirements of the Confrontation Clause, the court will allow its use at trial subject to the following conditions. Prior to introduction of the testimony, the Commonwealth must demonstrate that Storella is unavailable. Furthermore, only questions and answers allowed by the District Court judge will be read to the jury. Tanso's counsel will have the further opportunity to object to the admission of the testimony allowed in the District Court on a question by question basis in a hearing prior to trial.

RULING

I therefore rule that defendant Paul Tanso's motion in limine to exclude prior testimony of Richard Storella at the Rule 35 deposition is DENIED and the Commonwealth's motion to use the

testimony at trial is ALLOWED subject to the above outlined conditions.

_____

Robert W. Banks
Justice of the Superior Court

Dated: March 4, 1988

(2)

91-1786

NO. 91-1786

Supreme Court, U.S.
FILED
JUN 5 1992
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

PAUL TANSO,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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STATEMENT OF THE CASE

This counter-statement of the case is necessitated by the omission of numerous relevant facts in Petitioner's statement of the case. On March 3, 1986, ten days after his arrest for murder, the defendant Paul Tanso was brought before the Boston Municipal Court[1], where, having been denied pre-hearing access to statements of witnesses, his counsel waived a probable cause hearing. Without prior notice, the Commonwealth moved, pursuant to Mass.R. Crim.P., 35, to depose two alleged eyewitnesses to the murder, Joseph Schindler and Richard Storella. The motion was objected to by defense counsel but granted by the Municipal Court judge. The witness Schindler gave direct

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[1]Codefendant Frank DiBenedetto, whose trial was severed from Tanso's, was also present with counsel at the Boston Municipal Court proceedings.

testimony, and defense counsel stated he was not prepared to conduct a cross-examination. Commonwealth v. Tanso, 411 Mass. 640, 642-43, 583 N.E.2d 1247, 1249 (1992), rehearing denied, No. 5121 (Mass. Feb.6, 1992).

The following day, March 4, 1986, the witness Storella gave direct examination, and defense declined to cross-examine Storella at that time. The prosecutor pressed the judge for a finding that the defense had been "given reasonable discovery and reasonable opportunity to be heard and to cross examine," defense counsel opposed such a finding, and the judge refused to make it. The defendant's motion to hold the witness in protective custody was denied, but the judge granted defense discovery motions and continued

the proceeding to March 7, 1986. Id. at 643, 583 N.E.2d at 1249-1250.

On March 7th, after receiving limited discovery from the Commonwealth, defense counsel indicated that despite his best efforts to prepare for cross-examination of the witnesses, he still needed at least one more week. Counsel declared that they were not waiving their client's rights to confront the witnesses. Id. at 643-44, 583 N.E.2d at 1250. A renewed motion to hold Storella in protective custody was denied based on the Commonwealth's assertion that it would continue to protect Storella. The prosecutor opposed any continuance and again pressed the judge for a ruling on waiver. The judge again declined to find any waiver and further declined either to grant or deny a continuance, asserting that he was leaving

each of the parties to their various remedies. Id. The prosecutor continued to press for a colloquy with the defendant as to whether he was knowingly and intelligently waiving his right to cross-examination, the Commonwealth specifically recognizing that, absent the defendant's personal waiver, Storella's deposition could not be used if Storella should became unavailable. The Municipal Court judge refused the prosecutor's request, stating that any such colloquy would presuppose the existence of a waiver, which the judge was unwilling to find. Specifically, the court took pains to clarify that he was not foreclosing the defendants from seeking cross-examination at a later date, stating: "I'm not prepared to say to either of [the

defendants], you either go forward now or you waive your right."

In October, 1986[2], Tanso moved the Superior Court to permit the completion of the depositions through cross-examination. A Superior Court judge ordered the depositions "to continue" for the purpose of cross-examination and redirect. Id. at 644, 583 N.E.2d at 1250. Although at the hearing on this motion the Commonwealth had declared that both witnesses were still available to testify, three weeks later, in the face of the deadline for completing the depositions, the prosecutor claimed that Storella was "unavailable and will remain unavailable for an indefinite time."[3] From that date, December 2, 1986,

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[2]Indictments were returned on May 21, 1986. Id.

[3]Schindler's deposition was completed on December 2, 1992. Id.

through the time of trial, the Commonwealth continued to declare Storella unavailable and his deposition was never completed. Id.

In 1988, Tanso and the Commonwealth filed cross-motions concerning the admissibility of Storella's uncross-examined deposition. Another Superior Court judge, ignoring the implicit findings of his predecessor's ruling on the completion of the deposition, ruled that the Commonwealth could introduce Storella's deposition at Tanso's trial, concluding that Tanso had been provided with an adequate opportunity to cross-examine Storella and that Storella's testimony was sufficiently reliable. This ruling was subject to the Commonwealth's ability to prove Storella's

unavailability. Id. at 644-45, 583 N.E.2d at 1250.

At the hearings on Storella's availability, testimony was elicited from the lead prosecutor, Storella's sister and the chief investigating police officer. The prosecutor said the last time he remembered seeing Storella was at his grand jury appearance in May 1986. He admitted that, after that appearance, he did not remain in touch with Storella but claimed that he kept in touch with Storella's sister. The sister testified that she never received a single call from the prosecutor or any police officer until after her brother disappeared, i.e., the weekend after Thanksgiving, 1986. The prosecutor further testified that following the Superior Court's order of November 6, 1986 (granting the continuance

of the deposition), he did nothing to try to locate Storella until a ten-day interlocutory review appeal period had run, despite the fact that the order required the deposition to be completed by December 5, 1986. At some point after that, he claimed he called the sister only to learn that Storella was away on a trip. It was not until January, 1987, that he instructed the police to try to locate Storella. Evidence of efforts to locate Storella until the issuance of a capias in March, 1987 was also received at the hearing.

The chief investigating officer testified that, before January, 1987, he had no idea that there was any problem and the police custody of Storella had terminated after Storella's grand jury appearance. The officer was told by

Storella's boss that Storella had left his job shortly before Christmas 1986 and never returned. The officer also testified, in sharp contrast to the prosecutor's version of events, that he had seen Storella talking to the prosecutor in the courthouse in November and, again, in the District Attorney's office with the prosecutor in December. The prosecutor denied both encounters and the officer curiously claimed later, at trial, that he was "mistaken" about seeing Storella and the prosecutor together.

The trial judge found that Storella was unavailable[4], and Storella's uncross-examined deposition, with an assistant district attorney reading Storella's

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[4]The court below explicitly did not reach or discuss the issue of whether the witness was unavailable, Id. at 460 n.7, 583 N.E.2d at 1251 n.7

answers, was introduced at Tanso' trial. Id. at 645,583 N.E.2d at 1250.

At trial, the court admitted evidence of cocaine found at a codefendant's residence to corroborate Storella's testimony although said evidence was suppressed from use at that codefendant's severed trial. The judge in the Tanso trial refused to admit evidence that attacked Storella's credibility. Moreover, the trial judge refused to allow the jury to be informed that the deposition testimony did not contain cross-examination and, indeed, erroneously instructed the jury that it did contain cross-examination.

Following Tanso's conviction, Storella miraculously reappeared but Tanso's post-trial motions relating to his reappearance, including a motion seeking

to hold Storella as a material witness and/or for a hearing on his prior unavailability, were denied. Id. at 642 n.3, 583 N.E.2d at 1249 n.3.

The Supreme Judicial Court reversed Tanso's convictions finding that absent an adequate opportunity to cross-examine and either actual cross-examination or a waiver of that right, prior recorded testimony does not satisfy the Confrontation Clause's standards for reliability and may not be introduced at trial. Id. at 646-649, 583 N.E.2d at 1251-1254. Specifically, the court below held that at no time had Tanso expressly waived his right to cross-examine but rather had objected at all times that the Commonwealth claimed that his action's constituted a waiver. Moreover, "the defendant was not given any notice that

failure to cross-examine Storella by a certain date would result in a waiver of the right to cross-examine." Id. at 650, 583 N.E.2d at 1254.

SUMMARY OF THE ARGUMENT

The court below's decision followed the precedent of this Court which requires that waiver of the fundamental right to cross-examination under the Confrontation Clause be knowing and intentional, and the intention must be clear. The record in this case shows precisely the opposite, i.e., the expressed refusal of respondent to waive the right and the refusal of the court to find the respondent waived the right or even to require the respondent to cross-examine or waive.

Moreover, even if a waiver were found to exist, the uncross-examined prior recorded testimony would necessarily be

excluded from evidence because the order admitting it violated the law of the case where another judge required the respondent to be given the opportunity to cross-examine. In addition, the record reveals the prior recorded testimony was unreliable and that the prosecution acted in bad faith in its failure to secure the witness' attendance at his court-ordered continued deposition and at trial. Finally, the trial court's failure to instruct that there was no cross-examination, and, incredibly, to state to the jury that there was cross-examination, compounded the error in admitting the deposition testimony.

ARGUMENT

I. THE SUPREME JUDICIAL COURT'S DECISION IS CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS SET FORTH BY THIS COURT REGARDING THE ADMISSION OF PRIOR RECORDED TESTIMONY OF AN UNAVAILABLE WITNESS.

The Petitioner argues that the Supreme Judicial Court's decision expands a defendant's rights under the Confrontation Clause far beyond the prior decisions of this Court. This is simply not the case. The court below has clearly adhered to this Court's dictates in Pointer v. Texas, 380 U.S. 400, 404-405 (1965). Commonwealth v. Tanso, 411 Mass. at 650, 583 N.E.2d at 1253.

The Commonwealth first argues that the reliability prong of the Ohio v. Roberts, 488 U.S. 56 (1980), test was satisfied because Tanso had an adequate opportunity for cross-examination. Petitioner claims Tanso had received full

discovery and had three days in which to prepare a cross-examination. Petition, at 10.[5] However, the record in this case does not support this conclusion. The court below notes that prior to 5:00 p.m. on March 4, 1986, counsel had only received as discovery "a redacted search warrant, an incident report from the police, and a statement alleged to be a transcript of a tape recorded interview of Schindler," and that the judge had denied Tanso full discovery. Id. at 643 n.6, 583 N.E.2d at 1250 n.6. While the Commonwealth claimed to have provided all discovery by the evening of March 4th,[6]

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[5]References to the Commonwealth of Massachusetts' Petition for Writ of Certiorari are cited as "Petition, at ___."

[6]This, of course, left only two full days before the continued hearing on the morning of March 7th.

the record reveals that there was additional discovery then available which was not disclosed. Moreover, the two days left for preparation of the most critical cross-examinations in this first degree murder case was clearly inadequate time to review the discovery which was disclosed and conduct an investigation.

Most significantly, the "three days" becomes meaningless in light of the Supreme Judicial Court's conclusion that there should have been a hearing held on the time needed for cross-examination. Without such a finding in the record below, there is no possible way to conclude that this period is sufficient for preparation. Nor is the court below's holding that the trial court must determine the time needed for cross-examination and set a date after which

waiver will occur is not inconsistent with prior opinions of this Court. In Delaware v. Fensterer, 474 U.S. 15, 20 (1985), this Court recognized that the Confrontation Clause guarantees an opportunity for effective cross-examination, but such cross-examination need not be effective in every way envisioned by the defense. This Court has consistently maintained, however, that the principle of confrontation means more than being allowed to confront the witness physically. Davis v. Alaska, 415 U.S. 308, 315 (1974).

Further, the waiver of a constitutionally protected right must be knowing and intentional and this Court does "not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 1019, 1023 (1938). The

Supreme Judicial Court has echoed this language stating that the intention to waive such a constitutional right "must be made clear without implication, inveiglement or subtlety." Commonwealth v. Dustin, 373 Mass. 612, 368 N.E.2d 1388, 1391 (1977). The Court, in reviewing a determination of whether a defendant voluntarily waived his constitutional rights, will consider all surrounding circumstances and make an independent determination as to whether such a waiver occurred. Johnson v. Zerbst, 304 U.S. at 1025; Commonwealth v. Santo, 375 Mass. 299, 376 N.E.2d 866, 869 (1978); Commonwealth v. Jackson, 377 Mass. 319, 386 N.E.2d 151 (1979); Commonwealth v. Westmoreland, 388 Mass. 269, 446 N.E.2d 663 (1983). Additionally, the court below has appropriately indulged every

presumption against the waiver of fundamental constitutional rights and, consequently, there is a heavy burden on the Commonwealth to prove that Tanso made a knowing and intelligent waiver of a constitutional right. Commonwealth v. Watkins, 375 Mass. 472, 379 N.E.2d 1040 (1978); Commonwealth v. Pennellatore, 392 Mass. 382, 467 N.E.2d 820 (1984).

No such waiver is evident on the record below nor could one be inferred from the conduct of Tanso or his defense counsel. Indeed, the record is compelling that the defendant vigorously denied he was to waive his right of cross-examination and the Municipal Court judge just as vigorously declined to find that there was a waiver.

The Commonwealth further attempts to water down the reliability prong of the

Ohio v. Roberts test by mischaracterizing the test as an exception to the hearsay rule. In so doing, the Commonwealth misinterprets this Court's decision in Idaho v. Wright, 110 S.Ct. 3139 (1990), in which it was held that the prohibitions contained within the Confrontation Clause should not be equated with the general rules prohibiting the use of hearsay statements. Id. at 3146; see also White v. Illinois, 112 S.Ct. 736 (1992). Indeed, the Confrontation Clause bars the admission of some evidence that would otherwise be admissible under the hearsay rule. 110 S.Ct. at 3146. In Wright, as in the instant case, the hearsay statements (there, of the defendant's minor child) did not fall within a "firmly rooted" hearsay exception, i.e., co-conspirator statements, such that there is

no need for independent inquiry into reliability. Id. at 3148. Therefore, following its decision in Ohio v. Roberts, at 66, this Court determined that, although there was evidence admitted at trial which tended to corroborate the declarant's hearsay statements, such evidence was no substitute for cross-examination at trial. Wright, 110 S.Ct. at 3150. This Court further stated, in response to the same argument proffered by the Commonwealth in the instant case:

> In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees to trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that **cross-examination of the declarant would be of marginal utility.**

Id. (emphasis added.)

Moreover,the fact petitioner claims that six circuits have upheld the admission uncross-examined grand jury testimony is equally unpersuasive in light of this Court's holding in Wright.[7] In fact, one of the six circuits referred to in the Petition, at 17n.6, has reversed its prior decision, in view of Wright and has concluded that Wright reversed all the cases on which Petitioner now relies. United States v. Gomez-Lemos, 939 F.2d 326, 332 (6th Cir.1991). Indeed, the Gomez-Lemos court recognized the inherent unfairness of a rule which allowed the prosecutor to replace live testimony of key witnesses with prior uncross-examined testimony and thereby creating a powerful incentive for prosecutors to plan for or

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[7]See United States v. Zannino, 895 F.2d 1, 6 (1st Cir.1990).

acquiesce to the unavailability of said witnesses. Id. at 333.

The Commonwealth's final argument that the court below erred in rejecting petitioner's claim that Tanso had waived his rights for tactical reasons missed the import of the decision below. The Supreme Judicial Court rejected this argument because it found that so long as the opportunity for cross-examination existed, tactical reasons for failing to cross-examine were immaterial. 411 Mass. 649, 583 N.E.2d at 1253, citing Commonwealth v. DiPietro, 4 Mass.App.Ct. 845, 356 N.E.2d 269 (1976). Because the court below found that no opportunity for cross-examination existed, the issue of tactics becomes even less material. Further, the two cases cited by the Commonwealth, United States v. Johnpoll, 739 F.2d 702 (2d Cir.1984),

and United States v. Zurosky, 614 F.2d 779 (1st Cir.1979), cert. denied, 469 U.S. 1075, rehearing denied, 469 U.S. 11977 (1984), are consistent with the ruling of the court below because, in both of these cases, an opportunity to cross-examine was found, as distinguished from the case at bar.

Therefore, this Court should deny the Petition for a Writ of Certiorari.

II. EVEN IF THIS COURT WERE TO ADOPT PETITIONER'S POSITION, THE QUESTION OF ADMISSIBILITY OF THE PRIOR RECORDED TESTIMONY WOULD NOT BE RESOLVED

Assuming, arguendo, that this Court accepted the Commonwealth's argument that there was a waiver of the right of cross-examination, numerous additional issues necessarily must be addressed prior to a determination that the transcript of Storella's deposition is admissible.

A. The Supreme Judicial Court Did Not Decide Whether The Doctrine Of The Law Of The Case Barred The Trial Judge's Findings That Tanso Has An Opportunity For Cross-Examination

When the Superior Court judge specifically ruled in November, 1986, that the depositions of Schindler and Storella be continued, he considered whether defense counsel had forfeited the opportunity to cross-examination by their delay. The judge inquired of Tanso's counsel what had caused the delay in bringing the motion, to which counsel responded that he had conducted a very extensive investigation. The judge balanced the interests of the Commonwealth and Tanso in ruling to continue the depositions, stating:

> ...It seems to be clear that there was a direct examination; there remains the cross examination, and the question of whether or not in the interest of justice and fully aware

> of the rights of the defendant in assessing to protect their interests as well as that of the government, it is appropriate now in the posture of this case to allow the deposition to continue. I don't have to read Judge Hershfang.

This finding was made in the face of the Commonwealth's argument that Tanso had ample opportunity to cross-examine the witnesses and failed to do so. Therefore, the order to continue the deposition implicitly included the finding that Tanso did not have a sufficient opportunity to cross-examine. The order was never appealed by the Commonwealth.

It is respectfully submitted that this finding established the law of Tanso's case in the Superior Court and the subsequent ruling of another Superior Court Judge finding waiver erred in reversing that well-established law. The law of the case doctrine operates to make

binding upon a court "...a ruling made by a court at the same or higher level during prior stages of the same litigation, unless the ruling has been reversed in the interim." Lacy v. Gardino, 791 F.2d 980, 984 (1st Cir.1986). As this Court has noted, the law of the case doctrine "...posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Arizona v. California, 460 U.S. 605, 618 (1983).

The Supreme Judicial Court has also held that one judge of the Superior Court could not properly reverse the first judge's ruling or make a different decision. Second Nat. Bank of Malden v. Leary, 284 Mass. 321, 187 N.E. 611, 612 (1933). Under these circumstances it is

clear that the admission of the uncross-examined prior recorded statement improperly reversed the earlier ruling requiring completion of the deposition.

B. The Commonwealth Will Not Be Able To Establish The Reliability Of The Testimony Regardless Of Whether An Opportunity For Cross-Examination Existed.

Idaho v. Wright clearly stands for the proposition that the reliability of the prior recorded testimony may not be corroborated by evidence adduced at trial. 110 S.Ct. at 3150. Storella's testimony was patently unreliable, not only because he was never cross-examined, but because there existed a plethora of inconsistencies between the five prior statements he had given. The inherent unreliability of his testimony would be sufficient alone to foreclose the

introduction of his uncross-examined deposition testimony at trial.

The most important inconsistency in Storella's testimony was Storella's gradual memory failure concerning the weapons the alleged killers possessed, which he described very specifically in his initial statement to the police. This was of crucial importance because it was Tanso's contention that Storella, not he, was one of the killers and, therefore, Storella would have had an intimate familiarity with the weapons. Storella, on the other hand, could not have observed the weapons in such detail at night from a distance of fifteen to twenty feet, where he claimed to be when the shootings occurred.

In his first statement, he claimed that Tanso's codefendants had .380's, one

of which was a Baretta, and that Tanso had a .22 revolver. Realizing the inherent implausibility of his story, Storella adjusted it as he gave additional statements after his first one on February 22, 1986. Ultimately, he claimed that he never told police about a Baretta or a .22 magnum.

The record reveals numerous other equally serious discrepancies. Because Storella's various versions of his stories contain such inherent inconsistencies, his testimony can never be determined to be reliable.

C. The Trial Court Erred In Finding That Storella Was Unavailable.

The other prong of the Ohio v. Roberts test for admissibility was never reached by the Supreme Judicial Court. A witness is not unavailable where the proponent of testimony has engaged in

wrongdoing or had a hand in the witness' unavailability. Mass.R.Crim.P. 35(g). Indeed, this Court has concluded that where a witness' absence was due to the negligence of the prosecution, the witness' prior uncross-examined testimony could not be admitted against the defendant at trial. Motes v. United States, 178 U.S. 458, 474 (1900). More recently, this Court has affirmed this prong of the test where "the challenged out-of-court statements were made in the course of a prior judicial proceeding." White v. Illinois, 112 S.Ct. at 741.

The Supreme Judicial Court has held that a witness' unavailability cannot be established absent this showing of good faith and due diligence. Commonwealth v. Bohannon, 385 Mass. 733, 434 N.E.2d 163, 171 (1982); Commonwealth v. Furtick, 386

Mass. 477, 436 N.E.2d 396, 398 (1982); Commonwealth v. Cook, 12 Mass. App. 920, 423 N.E.2d 1056, 1057 (1981).

It is respectfully submitted that an analysis of the prosecutor's efforts to locate Storella is unnecessary because the Commonwealth was responsible, through its own wrongdoing, for the absence of Storella. United States v. Mann, 590 F.2d 361 (1st Cir.1978). The Commonwealth, in arguing before the Municipal Court in March, 1986 that Storella should not be held in protective custody, offered that it would continue to give Storella protection and even increase its protection of him as a result of his testimony. This protection was to continue through the grand jury proceedings and last through the trial. Clearly, the Municipal Court judge relied

on this representation in denying Tanso's motion to declare Storella a material witness and hold him in protective custody. It is submitted that because the Commonwealth made these representations to the court, it should be held responsible for Storella's later unavailability.

Further, Tanso was denied the fundamental right of cross-examination by the outrageous conduct of the prosecutor and law enforcement officials. The prosecution's case revolved around the two alleged eyewitnesses that were deposed pursuant to Mass.R.Crim.P. 35. Having obtained Storella's direct testimony, it is submitted that the Commonwealth had no intention of allowing him to be subjected to cross-examination. In fact, it was clearly a tactical decision on the part of the prosecutors to obtain just the direct

testimony of Storella in March, 1986, because they knew defense counsel was unprepared to cross-examine him, counsel having waived a probable cause hearing.

Moreover, the Commonwealth was placed on notice that there were important reasons to be suspect of Storella's testimony. On May 8, 1986, counsel for Tanso formally alerted the Commonwealth that Tanso had passed a polygraph examination, indicating that Storella was lying about Tanso's role in the murders. Despite this knowledge, and the knowledge that Tanso had not had an opportunity to cross-examine Storella, the Commonwealth failed to take reasonable steps to secure Storella's presence for trial.

In October of 1986, when Tanso was finally prepared to subject Storella to a meaningful cross-examination, he moved

for, and was granted, an opportunity to do so by a Superior Court judge. The judge ordered cross-examinations to be completed by December 5, 1986. At the hearing on the motion, the Commonwealth represented to the court that both witnesses were still available. However, the Commonwealth's conduct that followed the order allowing the continuation of the deposition is the best evidence of the fact that it never intended to produce Storella for cross-examination. On November 11, 1986, Tanso's counsel, in a letter to the prosecutor, suggested that the cross-examination of Schindler and Storella be conducted on December 1 and 2, 1986, to ensure compliance with the judge's December 5th deadline. The prosecutor was advised that if either of the two witnesses were not going to

voluntarily attend, defense counsel should be so advised and would obtain summonses from the court pursuant to Rule 35. The continued deposition was scheduled for December 2, 1986, and both witnesses were expected to attend. Schindler appeared on December 2, 1986, but the prosecutor announced on that day that "Mr. Storella is unavailable and will remain unavailable for an indefinite time. I expect on a day to day basis to receive updated information as to availability and intend to make counsel aware of his availability as soon as I become aware of it." From this statement and later ones made by the prosecutor, defense counsel was led to believe that the Commonwealth was making a good faith effort to abide by the judge's order.

The record reflects that this could not have been further from the truth. At the "unavailability hearing" held on the eve of trial, the detective in charge of the murder investigation revealed that he did not begin to look, nor was he asked to look, for Storella until January, 1987, nearly two months after the order to produce Storella for cross-examination. The officer also testified that he saw Storella at the courthouse in November and December, 1986, with the prosecutor.

The prosecutor testified at the unavailability hearing that he had seen Storella at his grand jury appearance in May, 1986 and had no recollection of seeing him after that but "may have." He denied seeing him at any time after the November 6, 1986 hearing and specifically claimed that the police officer was

mistaken about seeing Storella in the prosecutor's office in December 1986. His alleged "efforts" at complying with the order consisted of doing nothing to locate Storella for at least 10 days while the Commonwealth decided whether to appeal said order (which it did not) and then learning from Storella's sister that Storella had left home for a short trip "a week or so prior" to the prosecutor's first effort to contact Storella. Storella's sister testified that her brother left on a trip the weekend after Thanksgiving, 1986 (which would have been on or about November 29, 1986) and did not return, a far cry from the prosecutor's account (which would have Storella leaving in early November). She testified that while she had talked to the prosecutor several times on the phone, neither he nor

any police officer called her prior to the time Storella left on Thanksgiving weekend.

The prosecutor's testimony thus substantially conflicted with that of the investigating officer and Storella's sister, and compel a finding that there was a complete absence of a good faith effort to comply with the order or find Storella.

The First Circuit has stated that the government's duty to make the witness available

> ...cannot be satisfied by perfunctory efforts, if the rule is not to sanction the government's procuring depositions of witnesses, especially shaky witnesses, but then to **discourage attempts to bring the witness to trial so long as the government is satisfied with what is in the transcript.**

United States v. Mann, 590 F.2d at 367 (emphasis added). In Mann, the court held

that where the prosecutor failed to protect a witness' availability at trial by placing her in relaxed custody, or by simply restricting her ability to leave the jurisdiction, or by placing her under protective subpoena, the government could not subsequently claim that a good faith search prior to trial established the witnesses unavailability for the purpose of admitting previously recorded testimony. Id. at 366. More importantly, Chief Judge Coffin in his opinion found:

> [I]mplicit, however, in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent.

Id. at 368. Additionally, the court reasoned that where

> . . . the government had such means at its disposal but did not choose to use them . . . [t]he defendant should not suffer the injury from the government's choice. On this

> independent basis we would find that the government failed to demonstrate that the witness was unavailable.

Id.; accord, United States v. Rothbart, 653 F.2d 462, 466 (10th Cir.1981).

In the case at bar, the conduct of the prosecution is even more egregious than those facts in Mann. Here, the prosecution misrepresented material facts to the Superior Court, leading all parties and the court to believe that Storella had disappeared long before he actually had. This action (as well as delayed efforts to locate Storella) on the part of the prosecutor clearly demonstrates that the Commonwealth was content with the record testimony it had obtained from Storella and thus were neither going to permit a continuation of the deposition nor, more importantly, prevent Storella from disappearing before trial.

D. Other Errors Relating To The Admission Of The Uncross-examined Prior Recorded Testimony Denied Respondent A Fair Trial.

Even were this Court to find that the Storella transcript was properly admitted at trial, this Court's inquiry would not end. Numerous errors attendant to the trial court's admission of the testimony served to violate Tanso's due process rights.

First, the trial court refused to instruct the jury that the testimony did not contain cross-examination and, indeed, instructed defense counsel not to argue the lack of cross-examination of Storella to the jury. Second, the trial court refused to allow impeachment of Storella's testimony through the admission of prior inconsistent statements to other witnesses to show Storella's state of mind. Third,

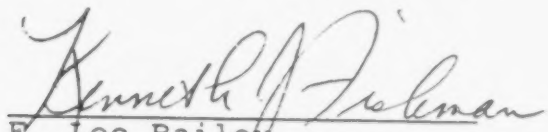
the trial court permitted the Commonwealth to introduce evidence to corroborate Storella's story although even though Storella had never been impeached. Lastly, and perhaps most egregiously, the trial court erroneously instructed the jurors that the testimony actually contained cross-examination when the court granted the jurors request during deliberations to have Storella's testimony read back.

Therefore, the rulings of the trial court served to further bolster Storella's credibility by leaving the jury with the impression that Storella's story was unimpeachable and corroborated by other evidence, in clear violation of Tanso's right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should deny the Commonwealth's Petition for a Writ of Certiorari.

Respectfully submitted,



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